No. 88-1114

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARVIN and GERALD LEBMAN,
Petitioners,

v.

AKTIEBOLAGET ELECTROLUX, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT D. OWEN
605 Third Avenue
New York, New York 10158
(212) 983-6900
Counsel of Record

R. LAURENCE MACON
JESSE R. CASTILLO
600 NBC Bank Building
San Antonio, Texas 78205
(512) 226-7000
Counsel for Respondent

Of Counsel
HOWARD E. BUCKLES
11770 Berea Road
Cleveland, Ohio 44111
(216) 252-8436

March 1, 1989

List of Parties

The parties to the proceedings below were the petitioners Marvin Lebman and Gerald Lebman. The class they represent consisted of 3,595 other shareholders of National Union Electric Corporation as of August 1, 1975.

The respondents below were Aktiebolaget Electrolux; Dometic, Inc.; and National Union Electric Corporation.

Pursuant to Rule 28.01, respondents make the following disclosure concerning corporate affiliates: In 1987, Dometic, Inc. was merged into White Consolidated Industries, Inc. Other corporate affiliates of White Consolidated Industries, Inc. are as follows:

> The Dometic Corporation; White Consolidated Industries, Inc.; National Union Electric Corporation and Divisions; Swan Services, Inc. (formerly Rollins Building Services); Tecfor, Inc.; Getinge International, Inc.; Appliance Components S.A. de C.V.; Air Machine Corporation; VWS, Inc. (formerly White Sewing Machine Company); Blaw-Knox Construction Equipment Corporation; Copes-Vulcan, Inc.; White Consolidated International Holdings Limited; WCI International Sales Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents Aktiebolaget Electrolux, Dometic Incorporated and National Union Electric Corporation respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's unreported opinion in this case.

Statement of the Case

Petitioners Marvin and Gerald Lebman are former shareholders of defendant National Union Electric Corporation ("National Union"). Their 127 shares of National Union, which they owned jointly, were lawfully extinguished in a short form merger effected in accordance with Delaware law on August 1, 1975 by defendant Aktiebolaget Electrolux ("Electrolux"). On that date, Electrolux was the owner of 92% of National Union's outstanding shares by virtue of its June 1974 offer to purchase.

Petitioners refused the offer of $28.00 cash per share to which the merger entitled them, and instead litigated to final judgment the value of their National Union shares in a statutory appraisal proceeding conducted in the Delaware courts. The fair value of their shares was there adjudged to be $24.85 each.

Almost three years later, after the appraisal hearing in February 1978 but prior to the entry of judgment in the Delaware Chancery Court—perhaps sensing that the Delaware proceedings would produce unsatisfying results— petitioners commenced this action on July 28, 1978 in the district court. This action saw four versions of petitioners' complaint, and an ever-shifting theory of the case.[1] In the end, however, the district court dismissed it as time-barred, relying on valid Fifth Circuit precedent.[2] The Fifth Circuit affirmed.

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[1] Throughout most of this action, the "essence" of petitioners' case (*cf.* Pet. 1) was that respondents had improperly undervalued the shares of National Union at the time of the tender offer and subsequent merger by not including a large component of value to reflect National Union's then-pending $360 million antitrust action against Japanese television manufacturers (*see* Pet. 9a n.2). At the time, of course, the outcome of that action was entirely unpredictable; assigning it any cash value was not required by any rule of law and would have been foolish.

This Court's dismissal of that action in 1986, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), brought petitioners' complaints on that subject to a sudden stop, and apparently refocused their attention on other of the 13 causes of action in their Third Amended Complaint (*see* Pet. 1).

[2] *Wood* v. *Combustion Engineering*, 643 F.2d 339 (5th Cir. 1981). After the decision of the Fifth Circuit, the Eleventh Circuit reviewed *Wood* in *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986), a case cited by petitioners (Pet. 6), in light of this Court's holding in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), another case cited and heavily argued by petitioners (Pet. 2, 3, 5-7). The *Friedlander* court, in contrast to petitioners' assertions (Pet. 5-6), expressly approved the holding in *Wood* even after and in light of *Wilson*. *Friedlander*, *supra*, 788 F.2d at 1509.

Petitioners state here that the "essence" of their claims is now that (i) at the time of the tender offer (which they did not accept) Electrolux omitted to state what they claim was "its intent to merge with National Union" (Pet. 1), and (ii) Electrolux intentionally undervalued the shares of National Union during the merger.

Both claims—and all eleven other asserted in the Third Amended Complaint—are time-barred, as both the district court and the Fifth Circuit found. Moreover, having already litigated the issue of value in Delaware, principles of res judicata bar petitioners from relitigating it in this case.

ARGUMENT

I.

The Facts of This Case Make It an Unsuitable Vehicle for a Major Review of Statutes of Limitations for Implied Actions.

Even were there an immediate need for the Court to conduct the major review of § 10(b) statutes of limitations that petitioners advocate (and there is no such need, see Point II, *infra*), this case is unsuited to the purpose.

First, petitioners point to *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir. 1988) (en banc), *cert. denied sub nom., Vitiello* v. *I. Kahlowsky & Co.*, — U.S. —, 57 U.S.L.W. 3223 (Oct. 3, 1988), and argue that it creates a conflict in the circuits on the issue of the applicable statute of limitations for § 10(b) actions. Petitioners laud the "extensive and well reasoned analysis of Judge Aldisert in *In re Data Access*" (Pet. 4), as if they

have an interest in obtaining the same holding in this case, but fail to mention that their case would be barred by the holding of *In re Data Access*.[3] Consequently, the Court's resolution of this purported "conflict" between *In re Data Access* and this case would be irrelevant to the ultimate outcome in this case.[4]

Second, one of petitioners' two essential claims, as they now describe them, is that their shares were "intentionally" undervalued during the short form merger (Pet. 1).[5] But petitioners omit to inform the Court that this centerpiece claim of theirs is barred by res judicata, since petitioners

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[3] *In re Data Access* held that the appropriate limitations period for complaints asserting violations of § 10(b) is the uniform period found in companion provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j *et seq.*: one year after discovery of facts constituting a violation and in no event more than three years after such violation.

In this case, the district court found, and the Fifth Circuit expressly affirmed (Pet. 5a), that the petitioners

> "had notice of all their claims no later than August 12, 1975, the day they received the document entitled 'Notice of Merger.'" (Pet. 4a).

This action was commenced almost three years later, on July 28, 1978 (Pet. 3a), and would therefore be barred by the "one year from discovery" holding of *In re Data Access*.

[4] Respondents recognize the possibility that the Court, upon addressing this issue, could endorse an approach other than the currently prevailing "absorption doctrine," *see, e.g., Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946), or the Third Circuit's new one-year/three-year standard (*see* n.3 *supra*), and that the Court's solution could remove the time bar from this claim. But both current alternatives bar petitioners' claims.

[5] In that transaction, the 8% of National Union's outstanding shares that remained in the hands of minority shareholders were extinguished pursuant to Delaware law and converted to the right to receive $28.00 per share in cash or an appraisal in the Delaware courts.

themselves litigated the issue of value to final judgment in the Delaware Supreme Court.[6]

Third, this case was resolved on motion papers in the district court, and thus lacks the well-developed record that an evidentiary trial would have created. As such, although the timing of the petitioners' discovery of crucial facts is clear, on certain other issues the record may be "cloudy", *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J.) and another case would present the Court with a cleaner record.[7] That later case, rather than petitioners', is the case in which the Court might review the far-reaching question sought to be raised by petitioners.

II.

No True 'Conflict Among the Circuits' Exists on the Statute of Limitations Issue.

The Third Circuit has not "rendered a decision in conflict with" the decisions of other circuits. *See* Sup. Ct. R. 17(a). While no other court of appeals has adopted a § 10(b)

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[6] *Petitioners Are Unrepresentative Plaintiffs.* Respondents argued below that this basic difference between petitioners' legal position and that of the absent 3,591 class members made them unsuitable class representatives. The district court rejected the argument, and respondents took a cross-appeal. The Fifth Circuit failed to reach the issue because it affirmed the district court's dismissal on the statute of limitations (Pet. 5a).

[7] The Court in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950), stated:

> "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by lower courts. Wise adjudication has its own time for ripening." *Id.* at 918.

limitations period similar to that embraced by the Third Circuit in *In re Data Access*, the circuits have followed different paths on this issue for decades. The adoption by one court of appeals of a federal statute of limitations hardly marks a dangerous departure requiring the immediate attention of the Court.

This Court has long deemed Congress to have intended that the federal courts "apply the most closely analagous statute of limitations under state law." *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) (footnote omitted) *citing Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).[8] Implicit in that well-traveled approach is an acceptance of diverse periods of limitation. And that diversity of standards—which in part reflects no more than the states' sundry approaches to limitations periods governing claims of fraud and blue sky violations—has not drastically impeded litigants or the lower courts.[9] The petitioners' argument to the contrary is unfounded.

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[8] This, of course, is the precise approach adopted by the Fifth Circuit in *Wood* v. *Combustion Engineering*, 643 F.2d 339 (5th Cir. 1981), the precedent upon which its dismissal of petitioners' appeal rested. *See also Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986).

[9] *See* ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986):

> "Four of the twelve federal circuits consistently apply the blue sky limitations period [of the forum state]; three others consistently use the state common law fraud period." *Id.* at 650 (footnote omitted).

The committee's report argues that national uniformity would be desirable and concludes that "[t]he only solution is for Congress to enact a uniform rule 10b-5 limitations period." *Id.* at 656.

III.

The Issue Is Not Yet Ripe for Consideration by This Court.

In re Data Access has been the law in the Third Circuit only since June 30, 1988. Other circuits have not yet weighed in with their comments.[10] Future cases in other circuits may well resolve the "conflict" in ways not currently foreseen. The Third Circuit's own decisions may season its new holding in ways that will materially enhance later consideration by this Court, if necessary. Certiorari on the issue is premature. *See, e.g., McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.), (certiorari denied where the issue requires "further study" in lower courts "before it is addressed by this Court").

IV.

The Fifth Circuit's Decision Regarding the Rights of the Absent Class Members Is Correct and Presents No Issue Worthy of Certiorari.

Petitioners contend [11] that the Fifth Circuit's decision is inconsistent with a recent Seventh Circuit ruling[12] concerning

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[10] In *Durham* v. *Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988), the Eleventh Circuit noted the existence of *In re Data Access* but adhered to its own rule. As of January 22, 1989, no other court of appeals, apart from the Third Circuit, had been noted on the Shepard's service carried on Lexis as having even cited *In re Data Access*.

[11] See Petition at 9-12.

[12] *Gert* v. *Elgin National Industries, Inc.*, 773 F.2d 154 (7th Cir. 1985).

the effect of dismissal of the named representatives' suit on the rights of the unnotified, absent class members. It is not. The decisions are nearly identical and are in harmony with this Court's decision in *Eisen* v. *Carlisle*, 417 U.S. 156 (1974), and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). There is no need for the Court to revisit this well-settled issue in this case.

In *Gert* v. *Elgin National Industries, Inc.*, 773 F.2d 154, 159-60 (7th Cir. 1985), the Seventh Circuit held that the dismissal of the named plaintiff's § 10(b) securities fraud action did not bar claims by the absent class members because they had not received notice of certification before the plaintiff's action was dismissed.

This is exactly what the Fifth Circuit held in *this* action:

> "Apparently, this class was certified but the case was dismissed before notice was given to any of the class members. The judgment of dismissal below and this opinion, therefore has [sic] no affect [sic] on the rights of those unnotified class members." (Pet. 5a).

While the named plaintiffs' action is time-barred, their failure to notify the absent class members before the district court entered summary judgment dismissing their claims merely prevents that decision from applying classwide. Petitioners should not now be heard to argue that their own failure to give the notice directed by the district court should somehow now entitle them to have their case reviewed by this Court.

Petitioners argument that the absent class members are somehow prejudiced by this result is illogical. Since the class was never notified of the pendency of this action, no class members could have been relying on its pendency to

"protect their rights" (Pet. 12) or even to toll the statute of limitations. How they are prejudiced by its dismissal without notice to them is left unexplained by the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 1, 1989

Respectfully submitted,

ROBERT D. OWEN
605 Third Avenue
New York, New York 10158
(212) 983-6900
Counsel of Record

R. LAURENCE MACON
JESSE R. CASTILLO
600 NBC Bank Building
San Antonio, Texas 78205
(512) 226-7000
Counsel for Respondent

Of Counsel
HOWARD E. BUCKLES
11770 Berea Road
Cleveland, Ohio 44111
(216) 252-8436